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SUPREME COURT

No. 98-155

In the

Supreme Court of the United States

October Term, 1998

Lori A. Todd,

Petitioner,

vs.

Ortho Biotech, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In requesting that this Court deny Petitioner-Employee Lori Todd's petition for a writ of certiorari, Respondent-Employer Ortho Biotech, Inc. ("Ortho") incorrectly states the holdings of both *Faragher v. City of Boca Raton*, 524 U.S. ___, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. ___, 118 S. Ct. 2257 (1998). The general theme of Ortho's brief in opposition is that the rule established by this Court in *Faragher* and *Burlington Industries* does not apply to a single, egregious incident of sexual harassment committed by a supervisory level employee who was not directly in the employee's reporting chain. Ortho's argument, however, is in direct contradiction to this Court's clear holdings in both *Faragher* and *Burlington Industries*:

> We hold that an employer is vicariously liable *for actionable discrimination caused by a supervisor*, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.

Faragher, 524 U.S. at ___, 118 S. Ct. at 2280 (emphasis added); *see also Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2270 (an "employer is subject to vicarious liability to a victimized employee *for an actionable hostile environment created by a supervisor* ..." (emphasis added)). Because the holdings of *Faragher* and *Burlington Industries* require that courts hold employers vicariously liable for all actionable sexual discrimination caused by a supervisor, subject only to the stated affirmative defense, this Court should reject Ortho's position and summarily reverse the Eighth Circuit's decision or, in the alternative, remand the case to the Eighth Circuit for reconsideration in light of *Faragher* and *Burlington Industries*.

DISCUSSION

I. ORTHO FAILS IN ITS ATTEMPT TO AVOID THIS COURT'S RECENT HOLDINGS

Ortho contends that the rule of employer liability announced in *Faragher* and *Burlington Industries* does not apply to the instant case because of two minor factual distinctions between those cases and Ms. To[illegible] case: (1) a severe one-time incident of sexual assault cre[illegible]l the hostile work environment in the instant case, whereas a series of less serious acts was the factual predicate for *Faragher* and *Burlington Industries*; and (2) the supervisor/harasser in the instant case may not have been in the employee/victim's "chain of command" at the time of the attack because of a lateral move within Ortho three weeks before the incident. Neither distinction places the instant case outside the reach of *Faragher* and *Burlington Industries*.

A. The *Faragher* and *Burlington Industries* rule applies to a severe one-time incident of sexual harassment.

Despite Ortho's contention to the contrary, the employer liability standard articulated in *Faragher* and *Burlington Industries* applies to one-time incidents of sexual harassment. The creation of a hostile working environment is a form of sex discrimination. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). A hostile work environment occurs when an employer's sexually demeaning behavior is "severe *or* pervasive." *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2265 (emphasis added).

The supervisors' acts in *Faragher* and *Burlington Industries* were found to be actionable because they were pervasive, whereas the supervisor's act in the instant case was

found to be actionable because it was severe. As the Eighth Circuit noted:

> In this case, Ortho quite properly concedes that an attempted rape at a national sales meeting is sufficiently severe misconduct to be *actionable sexual harassment*.

Pet. App. A-10 (emphasis added). Having admitted that its supervisor's attempted rape of Ms. Todd created a hostile work environment, Ortho is hardly in a position to argue that a single reprehensible act should lead to a more employer-friendly standard of liability than a series of less serious offenses. Under *Faragher* and *Burlington Industries*, employer liability does not depend upon whether the actionable sexual harassment is based upon pervasive acts or one severe act:

> The case before us involves numerous alleged threats, and we express *no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment*. When we assume discrimination can be proved, however, the factors we discuss below ... will be controlling on the issue of vicarious liability.

Burlington Industries, 524 U.S. at ___, 118 S. Ct. at 2265 (emphasis added). Thus, the only question before the Eighth Circuit was whether Ortho is liable for the sexual harassment perpetrated by its high-ranking supervisor. Although Ortho attempts to obfuscate the situation, the fact remains that Ortho is vicariously liable for the sexual harassment of its high-ranking supervisor subject only to its ability to prove the affirmative defense articulated in *Faragher* and *Burlington Industries*.

Ortho presents no direct support from the Court's opinions to support its contention that it should not be vicariously liable, but instead argues that application of the *Faragher* and *Burlington Industries* rule "to a one-time case of harassment such as this would, quite simply, be nonsensical." Brief in Opp. at 10. In addition, Ortho argues that "*Faragher* and *Burlington*'s additional focus on the possible negligence of the victim – which arose in the context of long-running incidents of sexual harassment – makes no sense when applied to a one-time incident of sexual harassment." *Id.* at 11.

Ortho's contention is based upon its theory that Title VII must be interpreted such that an employer can always avoid liability through *reaction* – by discovering and remedying isolated, but not severe, incidents before they create an actionable hostile work environment.[1] In so arguing, Ortho suggests that this Court has created a rule of vicarious liability for hostile work environment sexual harassment claims based upon pervasive actions while somehow leaving in place the negligence standard used in co-worker harassment cases if the claim is based upon an isolated but severe action.[2] As Justice Thomas noted in his dissent, however, the new rule no longer provides Ortho the escape hatch upon which the Eighth Circuit based its decision:

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[1] Essentially, Ortho is asking this Court to abandon the vicarious liability standard embraced in *Faragher* and *Burlington Industries* and reinstate the negligence standard employed by the Eighth Circuit. This is, however, the standard rejected by this Court in *Faragher* and *Burlington Industries*. *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2294 (stating that a remand for reconsideration "of negligence as an alternative to a theory of vicarious liability here" would be unjustifiable).

[2] If anything, this Court in *Faragher* and *Burlington Industries* sought to eliminate, rather than create, distinctions. This Court concluded that "a uniform and predictable standard must be established as a matter of federal law." *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2265.

> This rule applies even if the employer has a policy against sexual harassment, the employee knows about the policy, and the employee never informs anyone in a position of authority about the supervisor's conduct.

Burlington Industries, 524 U.S. at ___, 118 S. Ct. at 2271 (Thomas, J., dissenting).[3] As such, the distinction upon which Ortho bases its argument is without a practical difference.

Moreover, Ortho's interpretation of *Faragher* and *Burlington Industries* conflicts with the "apparently unanimous rule" holding employers vicariously liable for one-time incidents of quid pro quo[4] sexual harassment. *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2285. If *Faragher* and *Burlington Industries* stand for the proposition that a special rule applies in single incident harassment cases, one would have expected this Court to overrule the myriad circuit court

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[3] Ortho's reliance upon the existence of its sexual harassment policy is curious in that it never established at trial that it had *disseminated* such a policy. Ortho refers to two memoranda distributed prior to the attack, but at no time did Ortho enter its sexual harassment policy into evidence at the trial or establish that Ms. Todd received the policy. Under these circumstances, Ortho's protestations that it exercised reasonable care to prevent the attack are without merit. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2293-94 (liability found where defendant failed to distribute its sexual harassment policy to employees in plaintiff's position).

[4] This Court has erased any significant difference between the legal standard employed for holding an employer liable under claims for sexual discrimination based upon quid pro quo and under claims for sexual harassment based upon hostile work environment. *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2265 ("When we assume discrimination can be proved ... the factors we discuss below, and not the categories quid pro quo and hostile work environment, will be controlling on the issue of vicarious liability.").

opinions holding employers vicariously liable for one-time incidents of quid pro quo harassment. *See Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2264-65 (gathering cases). Instead, this Court stated that the "soundness of the results in these cases (and their continuing vitality) ... was confirmed by this Court's only discussion to date of standards of employer liability, in *Meritor*." *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2285 (parenthetical in original).

Finally, this Court's holdings in *Faragher* and *Burlington Industries* do not support Ortho's contention that application of the rule to the instant case would provide "no incentive for an employer to prevent or remedy such incidents." Instead, this Court has explained that the new rule of vicarious liability, subject only to the affirmative defense, provides employers with much incentive to assure that its high-ranking supervisors do not engage in sexual harassment:

> Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Faragher, 524 U.S. at ___, 118 S. Ct. at 2291.

B. The harasser in this case had sufficient authority to place Ortho within the holdings of *Faragher* and *Burlington Industries*.

Ortho also states, without citation to any portion of either opinion, that *Faragher* and *Burlington Industries* require application of the negligence standard of employer liability

used in co-worker harassment cases whenever the offending supervisor "lacks the authority to cause a tangible employment action." Brief in Opp. at 9-10. Ortho goes on to make the remarkable assertion that the National Director of Trade Relations who attacked Ms. Todd more closely resembled a co-worker than the type of supervisor contemplated by *Faragher* and *Burlington Industries*. Ms. Todd specifically addressed this issue at length in her petition for writ of certiorari, *see* Pet. at 14-17. It suffices here to note that, even if the supervisor in the case at bar lacked the actual authority to hire and fire the victim,[5] he never "more closely resemble[d] a co-worker" because, at the very least, the jury and trial court found that Moreland possessed and used his apparent authority to accomplish the harassment. Pet. App. A-61, A-40-41, A-46.[6]

Ortho characterizes Ms. Todd's contention that she reasonably believed Moreland to possess supervisory power at the time of the attack as "a wholly new twist" on her theory of

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[5] And once again, Ms. Todd reiterates that Ortho has failed to establish this fact at any point in the litigation.

[6] Moreover, Ortho's focus upon Moreland's ability to hire and fire is an incorrect analysis of Title VII liability. Although illegal hiring and firing are included as violations of Title VII, neither is required by the statute or corresponding case law. 42 U.S.C § 2000e-2 (a)(1), (stating that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex."); *Meritor*, 477 U.S. at 64 (stating that the "phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment"). Instead, a supervisor need only improperly affect the terms and conditions of employment to violate the statute. Here the district court found that "it was more than reasonable for the jury to infer that Moreland could easily influence all facets of [Ms. Todd's] career at Ortho Biotech by virtue of his top management position." Pet. App. A-31.

the case. Brief in Opp. at 3. Nothing could be further from the truth. Ms. Todd presented a great deal of evidence both to the effect that Moreland was in a position in the company hierarchy to have significant control over her employment situation and that she reasonably understood him to have such control. Pet. at 10-11 (summarizing evidence). As a result of this evidence, Ms. Todd requested Jury Instruction No. 37.[7] Brief in Opp. at 6-7. As part of this instruction, the court directed the jury to follow § 219(2)(d) of the Restatement (Second) of Agency-- precisely the same statement of law upon which the *Faragher* and *Burlington Industries* rule for employer liability is based. *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2290; *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2267-70; *but see* Pet. App. A-11 (Eighth Circuit refers to Instruction No. 37 as "reversible error"). As a result of that instruction, the jury specifically found that Moreland used "his actual or apparent authority at Ortho Biotech to further his harassment of Ms. Todd, or was ... otherwise aided in his accomplishing his harassment by virtue of the position he had with Ortho Biotech." Pet. App. A-61.

It simply does not matter whether a supervisor uses actual or apparent authority to sexually harass an employee. As this Court noted, "[t]he illustrations accompanying ... subsection [219(2)(d)] make clear that it covers *not only cases involving the abuse of apparent authority*, but also to cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship." *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2290. Such a conclusion dovetails perfectly with the basis upon which this Court decided *Faragher* and *Burlington Industries*: Employers will be liable if a high-ranking supervisor relies upon his or her position to create a hostile work environment. Both the jury and the trial

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[7] The complete jury instruction can be found in the appendix to the petition. Pet. App. A-68.

court found that Moreland relied upon his position to require Ms. Todd to accompany him to his hotel room where the attempted rape occurred; and both the jury and trial court found that Ms. Todd accompanied Moreland to his room because she reasonably perceived him to have authority over her career. Without further analysis, these findings are sufficient to impose vicarious liability on the employer subject only to the stated affirmative defense. *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2267-68 (stating that under the new rule of vicarious liability, an employer will be liable for supervisor sexual harassment when the victim's mistaken conclusion that the actor was a supervisor is a reasonable one).

CONCLUSION

Ortho's attempt to avoid the holdings in *Faragher* and *Burlington Industries* is without merit. Quite simply, the Eighth Circuit applied the wrong rule in reversing Ms. Todd's trial court judgment. Justice demands that this Court apply the correct rule. For the reasons set forth in Ms. Todd's petition for a writ of certiorari, this Court should grant the petition and summarily reverse the Eighth Circuit's ruling. Alternatively, this Court should grant the petition and remand the case for reconsideration consistent with the holdings in *Faragher* and *Burlington Industries*.

Dated: September 3, 1998

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